No. 10027

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

ROSETTA ALICE KELLEY, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

APPELLANT'S BRIEF

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BRIEF FOR THE APPELLANT

JURISDICTION

This is an appeal by the Government (R. 24) from a judgment for the plaintiff (R. 16–18) in a suit to recover death benefits under a contract of United States Government life insurance (R. 2–6).

The jurisdiction of the District Court was conferred by 38 U. S. C. A. 445. It was established by the plaintiff's complaint and the Government's answer that the insured died August 10, 1935 (R. 4, 8); that a claim for death benefits under the insurance contract was filed thereafter by the plaintiff with the Veterans Administration and was denied by the Administrator of Veterans' Affairs (R. 8–9); that the suit was brought August 7, 1940 (R. 6). Accordingly, there existed a disagreement, as required by the statute, and the suit

was brought within the six-year limitation period provided by the statute.

The jurisdiction of this Court is conferred by the provision in 38 U. S. C. A. 445, *supra,* that Circuit Courts of Appeals should exercise appellate jurisdiction and by the provision in 28 U. S. C. A. 225, granting to such courts appellate jurisdiction to review final decisions of District Courts.

The appeal was taken within the limitation period of three months provided in 28 U. S. C. A. 230. The judgment of the District Court was entered June 2, 1941 (R. 18). A motion for judgment notwithstanding the verdict or in the alternative for a new trial was filed by the Government June 6, 1941 (R. 21–23) and was denied July 2, 1941 (R. 23). A notice of an appeal from the judgment was filed September 30, 1941 (R. 24), within three months after the denial of the motion.

STATEMENT OF THE CASE

It was established by the plaintiff's complaint, the Government's answer, and by stipulations, that in March 1932 Thomas Joseph Kelley made an application in writing to the Veterans' Administration under Section 310 of the World War Veterans' Act 1924, as amended, 38 U. S. C. A. 512 (a), for a $5,000 United States Government life insurance policy, naming the plaintiff, Rosetta Alice Kelley, his wife, as the beneficiary; that the Veterans' Administration granted the application and issued the policy sued upon in the instant case; that monthly premiums were paid on the

policy, including the premium for the month of August 1935 during which Kelley, the insured, died (R. 3, 9, 30, 54–55).

The case was tried before District Judge J. F. T. O'Connor and a jury on the sole issue of whether, as alleged in the Government's answer (R. 9–13), the policy was obtained by fraudulent representations in Kelley's application for insurance. A motion for a directed verdict made by the Government at the close of the case was denied (R. 164).

SPECIFICATION OF ERRORS TO BE RELIED UPON

The Government relies upon the following points designated upon its appeal (R. 165–166):

1. That the trial court erred in denying defendant's motion for a directed verdict, and submitting the case to the jury for its determination, for the reason that defendant, by affirmative, substantial evidence, established as a matter of law, that the insurance policy sued upon had been obtained by fraudulent representations made by the insured in his application to the defendant for said insurance.

2. That the trial court erred in ordering judgment to be entered on the verdict.

3. That the trial court erred in making and entering its minute order of July 2, 1941, denying defendant's motion for judgment notwithstanding the verdict.

QUESTION PRESENTED

Whether, as a matter of law, the evidence requires a finding that the policy sued on was obtained by fraud.

STATUTES INVOLVED

Section 310, World War Veterans' Act, 1924, as contained in 38 U. S. C. A. 512a provides in part:

> Notwithstanding the provisions of sections 511 and 512 of this title, the United States, upon application to the Veterans' Administration, shall grant United States Government life (converted) insurance against death or permanent total disability in any multiple of $500 and not less than $1,000 or more than $10,000 to any person who had prior to May 29, 1928, applied or been eligible to apply for yearly renewable term insurance or United States Government life (converted) insurance: *Provided,* That such person is in good health and furnishes evidence satisfactory to the Administrator of Veterans' Affairs to this effect: * * *. (June 7, 1924, c. 320, §310; May 29, 1928, c. 875, § 15, 45 Stat. 970; July 3, 1930, c. 863, § 1, 2, 46 Stat. 1016.)

SUMMARY OF THE ARGUMENT

1. The evidence established beyond contradiction that representations made in Kelley's application on March 15, 1932, for the policy sued upon, that he had not applied for Government compensation and had not had any trouble except hemorrhoids since January 16, 1919, were false, made by him with knowledge of their falsity, and with the intent to deceive, and that the Government relied on each of them in issuing the policy. Since all of the elements of fraud were thus established by uncontradicted evidence, the District Court erred in denying the Government's motion for a directed verdict and its motion for judgment notwithstanding the verdict.

2. The District Court properly overruled the plaintiff's objections to evidence relied on by the Government herein.

ARGUMENT

I

The evidence required the conclusion as a matter of law that the policy sued on was obtained by fraudulent representations in the application therefor

SUMMARY OF THE EVIDENCE

Kelley, the insured, was a locomotive fireman by occupation, and a member of the Officers' Reserve Corps (R. 130). On March 15, 1932, he signed an application for insurance on a printed form issued by the Insurance Division of the Veterans' Bureau (Deft.'s Ex. A, R. 58–60). The following answers (among others) to questions propounded in the application appeared over his signature:

> 13. Have you ever applied for (a) Government compensation? *No.* * * * (d) Pension? *No.* (R. 58.)
>
> * * * * *
>
> 21. What operations have you had? * * * Hemroidectomy Sept. 1920 — *complet– recovery.* Dr. Guy Cochran Los Angeles.
>
> * * * * *
>
> 25. Are you now in good health? *Yes.*
>
> 26. Have you ever been treated for any disease of * * * heart * * * *No.* * * * bones? *No.*
>
> 27. Have you * * * contracted any disease * * * or consulted a physician in re-

gard to your health, since date of discharge?[1] *Yes.* * * * Hemroidectomy Sept. 1920—no other trouble—see above (R. 59).

The following answers (among others) to questions propounded in a Medical Examiner's Report (which was a part of the application) appeared over the signature of a doctor for the railroad company which employed Kelley (R. 134):

40. Has applicant ever had syphilis * * * or rheumatism? *No.*

41. Any defects in the sight * * *? *No.*

42. Any deformity or departure from normal in any respect? *No.*

* * * * *

49. Do you recommend acceptance of the risk? *Yes.* First-class risk. Yes. (R. 60). [Italics supplied.]

The application was sent to the office of the Veterans' Bureau in Washington where it was approved by the Insurance Medical Section (R. 60) and the policy was thereupon issued (R. 30).

On August 31, 1931, less than seven months prior to the application for insurance, Kelley had filed separate written applications with the Regional Office of the Veterans' Bureau at Los Angeles for compensation (Gov'ts. Ex. F., R. 82–88) and for disability allowance (Gov'ts. Ex. E, R. 75–81). In each application he described the nature of his ailments as rheumatism, heart trouble, and trouble with his spine (R. 77, 83, 84). In the application for compensation he stated that the

[1] Kelley was discharged January 16, 1919 (R. 58).

disability began in October or November 1918 while he was in the military service; that he was treated in "Base Hospital 48" (R. 83) and that the disability existed in December 1919 (R. 84). He listed as a civilian physician who had treated him since the beginning of his service in the World War (R. 83), Dr. F. P. King "D. C.", Chamber of Commerce Building, "Disability—Spinal adjustments." "Date — 9–30 — Mar. 31" (R. 84).

A report of examination made by Government physicians at Los Angeles October 28, 1931 (Govt's. Ex. G, R. 109) in connection with these claims (R. 115, 116) showed that Kelley complained of backaches and poor vision (R. 110), that a Wasserman blood examination was reported by the laboratory as positive (R. 113), and that Kelley's condition was diagnosed as "Aortitis, chronic, mild, with good cardiac tolerance" (R. 114). One of the doctors who signed the report described aortitis as an inflammation of the aorta, i. e., the large blood vessel leading out of the heart. He testified that this condition always called for a blood test for evidence of syphilis, and that the test in Kelley's case was reported positive (R. 121–122).

The only medical witness for the plaintiff testified that there was no indication in the report made by the Government physicians of any "visible effect" of syphilis on Kelley's body or health (R. 143). He further testified, however, that he was a medical examiner for five insurance companies (R. 136); that if he found that an applicant for insurance had aortitis and that the "Wassermann was positive" (R. 149) he would regard

the applicant as a "poor risk and subject to declination" (R. 150).

The Regional Adjudication Officer of the Veterans' Bureau at Los Angeles, in a letter dated November 17, 1931 (R. 128–129), advised Kelley, in effect, that he was suffering from 'aortitis, chronic, mild." [2]

Subsequent to Kelley's death on August 10, 1935 (R. 31), the Director of Insurance of the Veterans' Administration in Washington, D. C., in a letter dated August 29, 1935 (Deft's. Ex. C, R. 71–72), advised an official of the American Legion that the policy had been canceled and the plaintiff's claim disallowed because of fraudulent misrepresentations made by Kelley in his application for the insurance upon which, it was stated, the Veterans' Administration had relied in issuing the policy.[3]

The plaintiff testified that from the time of her marriage to Kelley in 1922 (R. 130) until the beginning of his last illness in the early part of 1934, he was never sick at home (R. 132); that he attended to his duties as a locomotive fireman and was required every two years to submit to an examination by the company doctor. She further testified, however, that she did not know whether he consulted any physician (R. 132) or

[2] The letter further stated that both of his claims were disallowed; that he was not entitled to disability allowance because the Regional Rating Board had rated his disability as "less than permanent partial 25%," and that he was not entitled to compensation because the Board had decided that his disability was not incurred in or aggravated by his military service.

[3] A copy of this letter was forwarded to the plaintiff herself (Deft.'s Ex. D., R. 74).

whether he received treatments for his back from Dr. King (R. 133).[4]

Three lay witnesses for the plaintiff testified that Kelley appeared to be in good health until the early part of 1934 (R. 155–156, 157–158, 162–163), and the testimony of the only other lay was, in effect, merely that "As a general thing" Kelley worked seven days a week for eight or nine hours per day as the fireman on an oil burning locomotive from 1929 until the early part of 1934 (R. 159, 161).

DISCUSSION

It is submitted that the evidence establishes beyond contradiction that Kelley made material misrepresentations of fact in his application signed by him on March 15, 1932 for the policy sued upon (R. 58–60); that these misrepresentations were fraudulent; that the Government relied on them in issuing the policy;[5] and

[4] Kelley stated in effect in his application for compensation that he had gone to "Dr. F. P. King, D. C." (apparently a doctor of chiropractic) for "Spinal adjustments" in 1930 and 1931 (R. 84).

[5] The elements of the defense of fraud in such a case as the present one are disclosed in numerous decisions to be these: (1) A false representation, (2) in reference to a material fact, (3) made with knowledge of its falsity, (4) and with the intent to deceive and be acted upon, (5) when action has been taken in reliance upon the representation. *Mutual Life Insurance Co.* v. *Hilton-Green*, 241 U. S. 613, 620, 622; *Claffin* v. *Commonwealth Ins. Co.*, 110 U. S. 81, 95; *New York Life Ins. Co.* v. *Fletcher*, 117 U. S. 519, 533; *Cooper* v. *Schlesinger*, 111 U. S. 148 (finding no error, p. 155, in the instructions of the District Court to the jury, pp. 152–153); *Lehigh Zinc and Iron Co.* v. *Bamford*, 150 U. S. 665, 673; *United States* v. *Depew*, 100 F. (2d) 725 (C. C. A. 10); *Hindman* v. *First National Bank*, 112 Fed. 931, 944–945 (C. C. A. 6). Cf. *Southern Development Co.* v. *Silva*, 125 U. S. 247, 250; *Derry* v. *Peek*, 14 App. Cas. 337, 374 (House of Lords).

that, accordingly, the District Court should have directed a verdict in favor of the Government.[6]

It appears by the uncontradicted evidence, we submit, that the negative answer to question 13 as to whether Kelley had "ever applied" for "Government compensation" (R. 58) was false, that it was known by Kelley to be false at the time he made it, that he made it with the intention to deceive and be acted upon, that it concerned a matter which was material to the risk, and that the policy was issued in reliance upon its truth.

While the defense of fraud is, of course, established by uncontradicted evidence showing that the answer to this question alone was fraudulent, we further submit that the defense of fraud is also established by the representations in Kelley's answers to questions 21 and 27. He represented, in effect, by those answers, that since the date of his discharge from the military service, January 16, 1919, he had not had any "other trouble" than hemorrhoids from which, he stated, he

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[6] The rule is well settled that "When, on the trial of the issues of fact in an action at law before a Federal court and a jury, the evidence, with all the inferences that justifiably could be drawn from it, does not constitute a sufficient basis for a verdict for the plaintiff or the defendant, as the case may be, so that such a verdict, if returned, would have to be set aside, the court may and should direct a verdict for the other party." *Slocum* v. *New York Life Insurance Co.* 228 U. S. 364, 369, quoted in *Gunning* v. *Cooley*, 281 U. S. 90, 93, with numerous supporting decisions. "A mere scintilla of evidence is not enough to require the submission of an issue to the jury." *Gunning* v. *Cooley*, p. 94; *Penna. R. Co.* v. *Chamberlain*, 288 U. S. 333, 339; cf. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 229.

had completely recovered after an operation in September 1920 (R. 59.)

A. The representation that Kelley had never applied for Government compensation was fraudulent

Falsity.—The uncontradicted evidence establishes the falsity of this representation. It is not disputed that Kelley, on August 31, 1931, signed and swore to an application for compensation on a form issued by the Veterans' Bureau (Deft.'s Ex. F, R. 82–88). That the application was received by the Regional Office of the Bureau in Los Angeles, California, is established by the uncontradicted evidence that the application was denied in a letter dated November 17, 1931, from the Regional Adjudication Officer (Deft.'s Ex. H, R. 128–129).

Knowledge of falsity.—There can be no doubt that Kelley knew of the falsity of the representation. The fact that he was a member of the Officers' Reserve Corps shows that he was a person of more than average intelligence and education. He had received the letter denying his application for compensation and informing him that he was suffering from aortitis only about four months prior to signing the application for insurance containing the representation. Under the circumstances, we submit it is inconceivable that a person of his education and intelligence had so soon forgotten the fact that he had applied for compensation.

Materiality.—In the absence of any evidence to the contrary, Kelley's representation that he had not applied for compensation will, we submit, be presumed to be material simply by reason of the fact that the Vet-

erans' Administration made specific inquiry with respect to that subject. *Bella S. S. Co.* v. *Insurance Co. of North America,* 5 F. (2d) 570, 572 (C. C. A. 4); *Kerr* v. *Union Marine Insurance Co.,* 130 Fed. 415, 417 (C. C. A. 6); *Metropolitan Life Insurance Co.* v. *Madden,* 117 F. (2d) 446, 451 (C. C. A. 5).

It is also manifest that representation was material *per se.* Mere mention of the application for compensation would have opened the door to an examination by the insurance officials of the Veterans' Administration of the records relating to the application for compensation and this would have revealed not only the diagnosis of aortitis, but also the fact that a blood test for syphilis was positive. With such a condition Kelley was manifestly not in "good health", as required by Section 310 of the World War Veterans' Act, *supra,* upon which his application for insurance was based. Indeed, plaintiff's own medical witness, a medical examiner for five insurance companies, admitted that an applicant for insurance who was in that condition would be a "poor risk and subject to declination" (R. 149–150). It is thus apparent, we believe, that a truthful answer to the question relating to application for compensation would have made available to the insurance officials abundant information pertinent to a determination of whether the risk of issuing insurance against total permanent disability and death should be assumed.

Intention to deceive.—Kelley's intention to deceive is presumed as a matter of law from the fact that he made the representation with knowledge of its falsity. *Mutual Life Insurance Co.* v. *Hilton-Green,* 241 U. S.

613, 622; *Claflin* v. *Commonwealth Ins. Co.,* 110 U. S. 81, 95. See also *Stipcich* v. *Metropolitan Life Ins. Co.,* 277 U. S. 311, 316–317, pointing out that "even the most unsophisticated person must know that in answering the questionnaire and submitting it to the insurer he is furnishing the data on the basis of which the company will decide whether, by issuing a policy, it wishes to insure him." Moreover, it is scarcely credible that a man of Kelley's education and intelligence could have been unaware of the fact that discovery by the insurance officials of the matters concerning his condition, contained in the records of his application for compensation, would at least impair his chances of obtaining insurance. The conclusion seems unavoidable that the misrepresentation in question was made in an effort to prevent the officials from obtaining that information.

Reliance.—The question as to whether an applicant had applied for Government compensation was manifestly inserted by the Insurance Division in the form of application for insurance for the purpose of obtaining an answer which could be relied on in issuing the insurance. *Stipcich* v. *Metropolitan Life Insurance Co., supra,* and that being the function of the answer, it will be presumed, in the absence of evidence to the contrary, that the insurance officials relied upon Kelley's answer to that question in issuing the policy in the instant case. *United States* v. *Depew,* 100 F. 2d, 725, 728 (C. C. A. 10); *Columbian Nat. Life Ins. Co.* v. *Rodgers,* 93 F. 2d 740, 742. If they had known that Kelley had applied for compensation they would presumably have investigated the records concerning his

application therefor and thus would have discovered the diagnosis of aortitis and the fact that the blood test for syphilis was positive. There is no evidence that they did so and knowledge of the contents of those records may not be imputed to the Government. This Court held in *United States* v. *Riggins,* 65 F. 2d 750 that in issuing insurance through the Veterans' Bureau, knowledge of the contents of the records of another Department may not be imputed to the Government. That decision was followed by the Circuit Court of Appeals for the Tenth Circuit in *United States* v. *Depew, supra,* p. 728, and the principle announced by this Court was applied in *Jones* v. *United States,* 106 F. 2d 888, 890–891 (C. C. A. 5) and *Halverson* v. *United States,* 121 F. 2d 420 (C. C. A. 7), certiorari denied. 62 S. Ct. 412, to cases where the facts were substantially identical with those in the instant case.

B. The representation that Kelley had not had any trouble except hemorrhoids since January 16, 1919, was fraudulent

That this representation was fraudulent is, we submit, established beyond dispute by the sworn statement of Kelley himself in his application for compensation made less than seven months prior to the application for insurance, that he had heart and spine trouble and rheumatism in 1919 and that he was treated for spine trouble from September 1930 to March 1931 (R. 84); by the statement in the report of the medical examination made in connection with the application for compensation that Kelley complained of backaches and poor vision (R. 110); and by the fact that Kelley was advised by the letter of the Regional Adjudication Officer

only about four months prior to his application for insurance that he was suffering from aortitis (R. 128).

The testimony of the plaintiff and her lay witnesses had no tendency to refute the facts shown by this evidence that Kelley had been having trouble with his health for a long time prior to applying for insurance. It tended to show at most that the trouble had not become severe enough to be apparent or to disable him from work. Moreover, as we have previously shown, the condition concealed by Kelley was manifestly material to the risk.

II

No error was committed by the district court in overruling the plaintiff's objections to evidence relied on by the Government herein

The plaintiff objected (R. 116–117) to the admission of the report of medical examination by Government physicians, dated October 28, 1931 (Govt's. Ex. G, R. 109). The report was admitted in evidence subject to motion to strike (R. 118). No motion to strike the report was made. Hence the objection was waived.

The plaintiff also objected to the offer in evidence of a carbon copy of the letter dated November 17, 1931, from the Regional Adjudication Officer to Kelley (Deft.'s Ex. H. R. 128–129) for lack of proof that the original was mailed (R. 108). The Government withdrew the offer temporarily (R. 108) and called two witnesses to prove that the letter was mailed (R. 124–127). One testified in effect that she was an adjudication clerk at the Regional office on the date of the letter:

that part of her duties were to advise claimants as to the contents of awards of compensation (R. 124); that she had stamped the copy of the letter in question with her initials, thus indicating that she had dictated and read it (R. 124–125) and had filed the copy (R. 126); that "Apparently" she had also signed the letter for the Regional Adjudication Officer (R. 126); and that it was her custom, after signing such a letter, to deposit it in the section mail box from which such letters were taken to the mail section, where they were put in the mail (R. 125). The other witness testified, in effect, that he was employed at the time in question in the mail section and had personal knowledge of the practice of that section; that when a letter was signed and placed in a box for outgoing mail, it was picked up by the messenger and delivered to the mail section, where it was folded, put in an envelope, and mailed (R. 127). The Government then reoffered the copy of the letter and the plaintiff again objected, but solely on the ground that notice to produce had not been served on her, thus, in effect, waiving her previous objection. The objection was overruled and the copy admitted (R. 128). We submit that this ruling was correct.

The plaintiff conceded that the copy came from the records of the Veterans' Administration (R. 108). The correctness of the address thereon was not challenged and was manifestly correct. By shifting the ground of her objection the plaintiff, in effect, conceded that the mailing of the original was established. It will accordingly be presumed, in the absence of evidence to the contrary, that the plaintiff received the

original *Dunlop* v. *United States,* 165 U. S. 486, 495; *Columbian Nat. Life Ins. Co.* v. *Rodgers,* 93 F. 2d. 740, 742 (C. C. A. 10). The objection on the ground of lack of notice to produce is thus untenable. See *Edmunds* v. *Atchison, etc. Ry. Co.,* 174 Cal. 246, 247–248; *Pratt* v. *Phelps,* 23 Cal. App. 755, 757–758, and other cases collected in Ann. 51 A. L. R. 1498.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment should be reversed and the cause remanded with directions to enter judgment for the Government pursuant to Rule 50 (b) of the Federal Rules of Civil Procedure, in accordance with the motion for a directed verdict. *United States* v. *Marsh,* 107 F. 2d. 173, 174 (C. C. A. 4), rehearing denied, 108 F. 2d. 558.

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APRIL 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942